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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 MSC MEDITERRANEAN SHIPPING  
4 COMPANY HOLDINGS S.A.,

Plaintiff,

New York, N.Y.

5 v.

16 Civ. 8103 (LGS)

6 FORSYTH KOWNACKI, LLC and  
7 MICHAEL KOWNACKI,

8 Defendants.  
9 -----x

10 October 18, 2016  
11 3:20 p.m.

12 Before:

13 HON. JOHN G. KOELTL,

14 District Judge

15 APPEARANCES  
16 (via telephone)

17 GIBSON, DUNN & CRUTCHER, LLP  
18 Attorneys for Plaintiff  
19 BY: JAMES L. HALLOWELL  
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1 (Case called)

2 THE DEPUTY CLERK: All parties please state who they  
3 are for the record.

4 MR. HALLOWELL: James Hallowell, Gibson, Dunn &  
5 Crutcher, for plaintiff MSC Mediterranean Shipping Company.

6 THE COURT: Is Mr. Kownacki on the phone?

7 MR. HALLOWELL: I don't believe so, your Honor.

8 THE DEPUTY CLERK: I left a message, and he has not  
9 responded.

10 THE COURT: All right.

11 Mr. Hallowell, did you give notice to Mr. Kownacki?

12 MR. HALLOWELL: We did, your Honor. My colleague Rick  
13 Dudley and I sent Mr. Kownacki two telephone calls last  
14 evening, four e-mails yesterday, and a telephone call again  
15 today.

16 THE COURT: Did you send the papers to Mr. Kownacki?

17 MR. HALLOWELL: As attached to the e-mails, and we  
18 will serve the papers hard copy today.

19 THE COURT: But the papers were included with the  
20 e-mails so that they were conveyed to Mr. Kownacki?

21 MR. HALLOWELL: Correct, your Honor, and we did not  
22 receive any bounce-back e-mails, so we believe that they went  
23 through.

24 THE COURT: My deputy has left word for Mr. Kownacki  
25 that we would hear him this afternoon at 3:00. Did you also

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1 let Mr. Kownacki know about that?

2 MR. HALLOWELL: We did, by both telephone and e-mails.  
3 We had asked Mr. Kownacki to contact me, and then I would  
4 connect in the court at 3:00 today, as you instructed. We have  
5 not heard from him.

6 THE COURT: Okay.

7 Well, I have reviewed the papers. Anything you would  
8 like to tell me?

9 MR. HALLOWELL: If your Honor is okay on the papers,  
10 that's fine with me. But I can also give you a summary of  
11 the relief that we are requesting and the basis for the  
12 request.

13 THE COURT: Okay.

14 MR. HALLOWELL: We are here today, your Honor, seeking  
15 a temporary restraining order to restrain defendants, Forsyth  
16 Kownacki and Michael Kownacki, from violating two separate  
17 confidentiality agreements that they have with plaintiff MSC, a  
18 nondisclosure agreement and the confidentiality provisions in a  
19 financing agreement between the parties.

20 Defendants have made explicit threats to disclose  
21 confidential information that they received from MSC pursuant  
22 to these requests. They threatened to do so to the press and  
23 in public court filings. There is no dispute that the  
24 information that they have received is in fact confidential and  
25 that its disclosure would violate the parties and irreparably

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1 harm MSC.

2 MSC is an international shipping company that has  
3 maintained the confidentiality of its financial statements and  
4 other financial documents and those are the documents and  
5 information that have been provided to defendants and that are  
6 the basis for the concern in our application today.

7 Forsyth Kownacki is a consulting firm that assists in  
8 financing arrangements and Michael Kownacki is a partner at  
9 that firm. The relevant agreements are within the papers that  
10 you have, your Honor. The NDA is Exhibit 1 to the sealed Vogel  
11 declaration.

12 We would note for your Honor that defendants have  
13 consented to the existence of irreparable injury in the event  
14 of disclosure of this information. They have done so, for  
15 instance, in paragraph 6.2 of the NDA. But, in any event,  
16 irreparable injury would exist because, once this information  
17 is disclosed, it cannot be put back in the bottle, so to  
18 speak.

19 MSC is likely to succeed on the claims that it has  
20 asserted in its complaint, including claims for breach of  
21 contract and anticipatory breach of contract, and also a claim  
22 under the amended Federal Trade Secret Act; and the balance of  
23 the equities favors MSC in this instance because MSC is seeking  
24 an injunction to maintain the status quo until such time as a  
25 preliminary -- a hearing on a motion for preliminary injunction

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1 can be held.

2 THE COURT: Okay. Do you have any reason to believe  
3 that anything has happened from yesterday until today in terms  
4 of the disclosure of any of the confidential information?

5 MR. HALLOWELL: We have no reason to believe one way  
6 or the other, your Honor, because we have not had any contact  
7 from FCC or from Mr. Kownacki. But that's the basis of our  
8 concern, your Honor.

9 You have seen the exhibits in the attached Vogel  
10 declaration, where the defendants have indicated an intention  
11 to file our confidential information publicly. You have also  
12 seen that co-counsel for MSC, Sheppard Mullin, in Exhibits 21,  
13 22, and I believe 24, have reached out repeatedly to  
14 Mr. Kownacki. There has been no response from him. And now  
15 there is no response from him, to our outrage, so we don't know  
16 what he could do.

17 THE COURT: All right. The reason for my question was  
18 somewhat academic. You came in yesterday with an *ex parte*  
19 order to show cause looking for a temporary restraining order  
20 without notice, which I declined to give, because I didn't see  
21 why notice should not be given and the other side given an  
22 opportunity to appear and explain why the temporary restraining  
23 order should not be granted. Notice has now been given, and so  
24 the reasons against an *ex parte* TRO no longer exist; and I was  
25 just interested to see whether, in fact, any harm had in fact

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1 occurred from the fact that notice was given to the defendants.  
2 And the answer is there is no evidence that there was any harm  
3 from giving notice to the defendants, which is not to say that  
4 you haven't made a sufficient showing for a temporary  
5 restraining order after notice. Notice has now been given and  
6 defendants have chosen not to appear, not to resist the  
7 temporary restraining order. It is simply a good object lesson  
8 that some of this could have been avoided had notice been given  
9 yesterday before coming in, but here we are.

10 You have plainly made a sufficient showing for a  
11 temporary restraining order. There is a showing of immediate  
12 and irreparable injury from the disclosure of confidential  
13 information which the defendants were obligated not to  
14 disclose.

15 You have also made a sufficient showing of a  
16 likelihood of success on the merits based on both the  
17 anticipatory breach of contract and the actual breach of  
18 contract.

19 There were two agreements that provided for  
20 maintaining confidential information. The defendants were  
21 under an obligation to return the confidential information on  
22 demand. Demand was made. They refused to do it. On top of  
23 that, they threatened to disclose plainly the confidential  
24 information as a litigation tactic.

25 In addition to being an anticipatory breach of the

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1 agreements, there is also a showing of the breach of fiduciary  
2 duty. There is also a showing, although it would be  
3 unnecessary, that the balance of equities tips decidedly in  
4 favor of granting the temporary restraining order. There is no  
5 equity on behalf of the defendants in being able to disclose  
6 confidential information that they are required not to  
7 disclose, and there is a strong interest that the plaintiff has  
8 in assuring that its confidential information is not disclosed.

9 So the next question is a date for the hearing on the  
10 preliminary injunction.

11 (Pause)

12 THE COURT: October 27, at 3:30 p.m.

13 MR. HALLOWELL: October 27, at 3:30 p.m., your Honor?

14 THE COURT: Yes.

15 MR. HALLOWELL: Thank you.

16 (Pause)

17 THE COURT: I am just reading over the papers for the  
18 order incorporating the temporary restraining order and setting  
19 the preliminary injunction hearing down. That's why there is a  
20 pause in the phone.

21 (Pause)

22 THE COURT: You want the papers delivered to the  
23 attention of Anne Champion.

24 MR. HALLOWELL: Yes, your Honor. She is my partner,  
25 who is out this week, but will be back.

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1 THE COURT: Okay. So responsive papers should be  
2 submitted by October 24 and reply papers by October 26.

3 There should be only a minimum bond in this case, so  
4 the bond will be \$1,000.

5 MR. HALLOWELL: Your Honor, will the hearing be  
6 conducted by you as the Part I judge?

7 THE COURT: It will be conducted by me, and I will  
8 still be the Part I judge, but I had taken the TRO and the  
9 preliminary injunction from Judge Schofield as a Part I matter.  
10 Even if it goes over until the following week, I will still  
11 keep it for purposes of the preliminary injunction. The case  
12 is before Judge Schofield, but the TRO and preliminary  
13 injunction are before me as a Part I matter.

14 Okay. I have signed the order granting the TRO and  
15 setting a hearing on the preliminary injunction, and we can see  
16 that that order is filed on ECF and a copy is faxed to you. If  
17 you want, Mr. Hallowell -- let me just check one other thing.

18 (Pause)

19 THE COURT: Service of this order and all of the other  
20 papers thus far should be made by October 19.

21 MR. HALLOWELL: Okay.

22 THE COURT: All right. I think that covers  
23 everything. Anything else?

24 MR. HALLOWELL: Thank you, your Honor. That does  
25 cover everything, and we will proceed accordingly.



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1 THE COURT: Okay. Thank you.

2 MR. HALLOWELL: Thank you.

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